IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-678

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut

Appellant,

v.

DONNA DOE, ET AL

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff-appellee children respectfully request leave, pursuant to Title 28 U.S.C. §1915 and Rule 53 of the Rules of this Court, to proceed in forma pauperis in defending this appeal. In support of this motion the children rely on the affidavits filed in support of their mother's applications to proceed in forma pauperis, filed herewith.

PLAINTIFF-APPELLEE CHILDREN

BY _____

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CERTIFICATION

This is to certify that a copy of the foregoing Motion to Proceed In Forma Pauperis was mailed first class mail postage prepaid this 23rd day of December, 1976, to:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-970

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

Defendant-Appellant

V.

DONNA DOE, ET AL., Individually and on behalf of all others similarly situated

SHARON ROE, ET AL., Individually and on behalf of all others similarly situated

Plaintiffs-Appellees

+ + + + + + +

APPELLEE MOTHERS' AND CHILDREN'S MOTION TO DISMISS OR AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DONNA DOE, ET AL., Individually
and on behalf of all others
similarly situated

SHARON ROE, ET AL., Individually
and on behalf of all others
similarly situated

V.

EDWARD MAHER, Individually and
as Commissioner of Social Services
of the State of Connecticut

++++++

APPELLEE MOTHERS' AND CHILDREN'S MOTION
TO DISMISS OR AFFIRM

The classes of appellee mothers and appellee children, pursuant to Rule 16 of the Supreme Court of the United States, move to Dismiss the Appeal and/or to Affirm the Judgment below on the grounds that this Court lacks jurisdiction over this appeal, and that the appeal presents no substantial question warranting plenary consideration by this Court.

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OPINION BELOW

The opinion of the District Court which accompanied the limited injunction from which this appeal has been taken is reported at 414 F Supp 1368. Earlier opinion in this action are reported at 356 F Supp 202 (1973) (sub nom Doe v Norton, (denying preliminary relief), 365 F Supp 65 (1973)(Ibid, denying permanent injunctive and declaratory relief), 415 US 912 (1974) (sub nom Roe v. Norton noting probable jurisdiction), and 422 US 391 (1975) (sub nom Roe v. Norton, vacating and remanding.

JURISDICTION

Appellee mothers, plaintiffs below, brought this action under the civil rights act, 42 U.S.C. Section 1983, jurisdiction being predicated on 28 U.S.C. Section 1343(3), and the declaratory judgment act 28 U.S.C Section 2201. The District Court assumed jurisdiction under these statutes, convened a three-judge court pursuant to 28 U.S.C. 2281 and 2284.

After remand by this Court the District Court permitted intervention by fresh plaintiffs on the same jurisdictional bases and entered injunctive relief. The repeal of Section 2281 does not affect this appeal; P.L.94-381, Section 7.

Appellant bases his appeal on the direct appeal statute, 28 U.S.C. Section 1253. Appellee mothers submit, and argue further below, that the direct appeal statute does not apply here because the appellant does not request reversal of any order based on the adjudication of the constitutional merits of the action within the meaning of MTM v. Baxley, 420 US 799 (1975), and that one of the questions sought to be decided on this appeal is premature in that it is raised only by post-judgment motion, presently pending in the District Court.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. Section 1253 to hear this appeal.

2. Whether there is a substantial question warranting plenary review as to whether the District Court's order, enjoining the appellant Commissioner of Social Services from terminating assistance or referring for contempt of court proceedings mothers of illegitimate children who are unwilling or unable to comply with a demand that they disclose the names of their children's fathers and/or prosecute paternity actions, without first affording an appropriate hearing to determine whether such action is consistent with the child's best interests as defined by mandated but not-yet-promulgated federal and state regulations, was in excess of its equitable discretion.

STATUTES INVOLVED

Connecticut General Statutes Section 52-440b:

> "(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a decree of divorce or dissolution or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the court of common pleas (assigned to a geographical area) and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.
>
> "(b) Any woman who, having been cited to appear before a judge of the court of common pleas pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."

Title 42 U.S.C 602(a)(26) and (27) (as amended by P.L. 93-647, 94-46 and 94-88):

Section 402(a):

> "A state plan for aid and services to needy families with children must....

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

"....

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, (unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf the aid is claimed;) and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section;

"(27) provide, that the State has in effect a plan approved under part D and operates a child support program in conformity with such plan."

STATEMENT OF THE CASE

Connecticut General Statutes Section 52-440b requires each mother of illegitimate children to disclose the name of her child's father and prosecute a paternity action against him whether, in her opinion, such action is desirable or not. Mothers on welfare and mothers whose children have guardians other than themselves may be subjected to contempt proceedings in the court of common pleas if they refuse to comply, and they face up to a year in jail if found in contempt.

The plaintiff classes of mothers commenced two actions in early 1973, challenging C.G.S. Section 52-440b as violating their contitutional rights to privacy, due process and equal protection and as contravening applicable sections of the Social Security Act. Some of the mothers had been threatened with contempt citations, others had received them.

The District Court for the District of Connecticut denied preliminary relief in one action, Doe v Norton 356 F Supp 202, convened a three-judge court, appointed separate counsel to represent the children, and consolidated the two actions. After a hearing on the merits, the District Court certified them as class actions and upheld the statute on the merits, 365 F Supp 65 (1973). Plaintiffs appealed. This Court noted probable jurisdiction Roe v Norton, 415 US 912 (1974), heard oral argument 43 LW 3469 (1975) and vacated the District Court's judgment, remanding for further consideration of two questions:

> ...further consideration in light of Pub L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of Younger v Harris 401 US 37 (1971) and Huffman v Pursue 420 US 592 (1975),422 US at 393.

Before the District Court acted on remand, the Social Security Act was amended again, and it now provides that states must terminate AFDC payments to parents who refuse to cooperate with the state in securing support from legally liable relatives

> unless...such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed;....42 U.S.C. Section 602(a)(26)

The Secretary of Health, Education and Welfare is required to promulgate new standards for determining the child's best interests subject to Congressional approval, but to date he has not done so. Section 402(a)(26) is mandatory, not permissive, and neither it nor any other provision of the federal law recognizes Connecticut's statutory civil contempt procedure.

The three-judge District Court held a hearing on remand, permitted intervention of fresh parties and, on June 1, 1976, issued an opinion, reported sub nom Doe v. Maher at 414 F Supp 1368 (with District Judge Newman concurring). The District Court

redesignated two subclasses of mothers: 1) those who had been served with contempt citations, and 2) those who were threatened with such citation. The court held that comity did not require dismissal as to either subclass, 414 F Supp 1374-1377, but enjoined enforcement of both C.G.S. Section 52-440b (civil contempt sanction), and Welfare Supplement IV-D (termination of benefits sanction)"until after full compliance with the provisions of Section 402 (a)(26) of the Social Security Act as amended" 414 F Supp at 1382. The required compliance was defined to include following "such regulations as the Secretary of HEW shall issue (including the right to a fair hearing)" 414 F Supp at 1381-2.[1]

As the Congressionally mandated federal regulations have not been issued the District Court's injunction is in full effect.

The evidence before the District Court consisted largely of transcripts of hearings held under Section 52-440b in the Courts of Common Pleas, and affidavits from members of the subclasses of plaintiff mothers. Depositions of experts were introduced by counsel for the plaintiff-appellee children. The record also contains evidence of the administrative practice under Section 52-440b and bulky administrative policies, of which Section 404.6, (Appendix D to the Jurisdictional Statement) is only one of the relevant provisions.

The defendant Commissioner of Social Services has now appealed and in his jurisdictional statement appears to raise two contentions: 1) that federal regulations 45 CFR 303.5, remains the federally mandated standard for determination of those cases in which the mother claims that a refusal to cooperate is justified by her child's best interests despite the passage of P. L. 94-88,

1/ In dictum a majority of the District Court reiterated its opinion that the statute was facially constitutional, while concurring. Judge Newman noted that the constitutional issues were not reached.

Section 208 of which mandates new regulations defining such standards and procedures, and 2) that the injunction issued was too broad in light of applicable federal statutes and assertedly operative federal regulations, because it required a fair hearing and determination of good cause prior to action under Section 52-440b in the case of those mothers who are unable to name their children's fathers as well as in the cases of those unwilling to do so.[2]

I. THE APPEAL SHOULD BE DISMISSED BECAUSE APPEAL FROM THE ORDER BELOW DOES NOT LIE TO THIS COURT

A. A Three-Judge Court was Not Required to Hear the Issues on Remand

The Supreme Court has jurisdiction on direct appeal under 28 U.S.C. Section 1253 when an injunction has been granted or denied "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Only a three-judge court could, on June 1, 1976 enjoin "the enforcement, operation or execution of any State statute...upon the ground of the unconstitutionality of such statute..." 28 U.S.C. Section 2281. The general rule, stated in MTM v. Baxley, 420 U.S. 799 (1975), is that

> "a direct appeal will lie to this Court under Section 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." Id., at 804

The order at issue in this case could have been made by a single judge. A three-judge court is not required to enjoin enforcement of a state law that conflicts with a federal statute and is thus

2/ Appellant has thus abandoned any claim that the District Court misapplied the comity doctrine in reaching the merits of this case or that no injunction should have issued. He claims only that the injunction which did issue was too broad.

void under the supremacy clause. This is so even though the complaint also demands relief on constitutional grounds. Burns v. Acala, 420 US 575 (1975); Shea v Vialpando, 416 US 251,258 (1974); Hagansv. Lavine, 415 US 528, 544 (1974); Rosado v. Wyman, 397 US 397 (1970); Swift & Co. v. Wickham, 382 US 111 (1965). The determination that federal relief is not barred by principles of comity is also within the purview of the single judge when it is preliminary to a nonconstitutional holding.

B. No Exceptional Circumstances Justifying Direct Appeal from an Order Not Required to be Issued by Three Judges are Present in This Case

The Court has heard appeals under Section 1253 in some circumstances in which the three-judge court has been properly convened to consider constitutional issues but issued an injunction on statutory grounds alone. The special circumstances justifying an exception from the general rule of Baxley are not present here. In Engineers v. Chicago, R. I. & P. R. Co., 382 US 423 (1966) a three-judge court was convened to hear a constitutional challenge to Arkansas's full-crew laws on the ground that they burdened interstate commerce; but the laws were enjoined on congressional pre-emption grounds. This court heard a direct appeal under Section 1253; but, in contrast to this case the District Court, acting before Swift and Hagans,was un-instructed about the preferability of resolution of the statutory issues by a single judge. Three-judge court determination of the statutory issue and appeal under Section 1253 to this Court were at that time appropriate accommodations of the interests protected by the three-judge court act and considerations of judicial economy. See Phillips v. United States, 312 US 246 (1941).

3/ Moreover, Engineers followed closely after Swift and the Court's jurisdictional discussion may have been designed in part to avoid an otherwise unnecessary series of manuvers to bring the case before the court of appeals, where no actual judicial economy was involved.

In Philbrook v. Glodgett, 421 US 707 (1975) the Court stressed the presence of exceptional circumstances justifying the convening of a three-judge court below and entertained a direct appeal from an injunction issued on supremacy clause grounds. The Court pointed out that although

> "it was the preferrad practice for a single judge when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court (, T)he District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint,... and raised their statutory contention, for the first time, at oral argument before the three-judge court." 421 U.S. at 712 n. 8.

There are no similar exceptional circumstances justifying departure from Hagans and Baxley present in this case. Consideration on remand should have been by a single judge because the mandate of this Court specifically directed reconsideration in light of single-judge issues. See Youakim v. Miller, ___ US___, 96 S. Ct. 1399 (1976). Under these circumstances, the unnecessary expenditure of judicial resources at the district court level does not justify the additional extraordinary process of direct appeal.

C. Dismissal of this Appeal is Consonant with the Purposes of the Three-Judge Court Act

Direct appeal of this order does not further the historical purpose of Section 1253. This Court recently noted that

> "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal judge." Gonzalez v. Automatic Employees Credit Union, 419 US 90, 97 (1974).

In holding that Section 1253 must be narrowly construed so as to limit the use of the three-judge court mechanism to situations implicating that purpose, the Court applied the rationale of Phillips v. United States, supra:

> It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conven-

> tional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation in the hands of a single judge, it was no less mindful that the requirement of three judges...entails a serious drain upon the judicial system...Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of Section 2281 would defeat the purposes of the Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. Id., at 250. (Emphasis added.)

Narrow construction of the three-judge court provisions, including Section 1253, is peculiarly appropriate when the operation of state law is enjoined simply because it conflicts with a federal statute. In a statutory case there is no danger that a lower court has misused the delicate tool of Constitutional judicial review; and any errors it makes are subject to legislative as well as appellate correction. See Swift v. Wickham, supra, 382 US at 127-128.

Congress has approved this policy of restrained review by eliminating three-judge courts and direct appeals therefrom in injunctive suits challenging the validity of state statutes on constitutional grounds. ___Stat.___, P.L. 94-381. (1976).

By its 1975 remand of this case for decision on statutory rather than constitutional grounds, this Court acted to insure the least possible intrusion into the legislative sphere.

Therefore, "the coincidence of a constitutional and statutory claim should not automatically require a single judge to defer to a three-judge panel" (Hagans v. Lavine, supra, 415 US 544) nor compel this Court to consider an appeal under Section 1253. The appeal should be dismissed.

II. THE INJUNCTION BELOW WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S EQUITABLE POWERS

The District Court, finding a question of federal supremacy in the enforcement of C.G.S. Section 52-440b and the Connecticut "IV-D" program, enjoined both terminations of assistance and citations for contempt under Section 440b "until after full compliance with the provisions of Section 402 (2)(26)... as amended" (414 F Supp at 1382). The Court justified this injunction by finding:

> The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs..Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to "cooperate," is at the very least inappropriate. (Ibid 1381-2).

Although to date no final federal or state regulations have been published, the Secretary of HEW has published proposed regulations and received comments on them.

The appellant Commissioner does not in his Jurisdictional Statement attack the District Court's application of the supremacy clause, nor does he argue that no injunction was appropriate to enforce the applicable federal statute. Rather he seems to think that the injunction was too broad, or possibly ill-timed. Although his claims are less than clear, he appears to want to enforce a very narrow definition of the child's best interests until HEW promulgates a new and broader one.

It is axiomatic that a federal District Court, faced with a violation of applicable law by a public body, has substantial latitude in determining both the scope and timing of relief Rosado v. Wyman, 397 US at 397 (1970), Brown v. Board of Education, 349 US 294,300. See also Mills v. Gautreaux, ___US___ 47 LE2d 792 (1976), Reynolds v. Sims 377 US 533, Ely v. Klahr 403 US 108 (1972) and United States v. W.T. Grant Co., 345 US 629 ( ).

This Connecticut statute has been the subject of protracted litigation, and the public policies in question have been the subject of heated dispute within all three branches of government for at least eight years. See, e.g. Doe v. Shapiro 302 F Supp 761 app dis'd 396 US 488, Lascaris v. Shirley 420 US 730 (1975), P. L. 93-647 (and Leg. Hist.), P. L. 94-46, P. L. 94-88 (and Leg. Hist.) and 41 Fed Reg. 34296-34301 (August 13, 1976) (proposed regulations).

The record in this case is replete with the type of abuses which Congress has sought to prevent in mandating a substantial qualification on the mother's duty to "cooperate" where she has good cause considering inter alia the child's best interest, for refusing to do so. This Court agreed that the constitutional questions presented by the Connecticut statute were substantial in noting jurisdiction and hearing full argument Roe v. Norton 415 US 912 (1974). And see Soifer, "Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary" 7 Conn.L.Rev 1 (1974).

It was precisely because, as concurring Judge Newman found "rather sensitive constitutional adjudication will be required of State Common Pleas judges in the course of considering contempt actions to compel disclosure of the father's identity" 414 F Supp at 1383, citing 365 F Supp at 84, that clear and constitutional standards should be developed before the state attempts to enforce the "cooperation" either by cutting recipients off from welfare or finding them in contempt of court. See Vol. II, Weekly Compilation of Presidential Docs. No. 2 p 20,(1975) and H. Rept. 94-368, pp 8-12 (August, 1975). And see Cleveland Board of Education v. LaFleur 414 US 632 (1974), Pierce v. Society of Sisters 268 US 510, Stanley v. Illinois 405 US 645 (1972), and Roe v. Wade 410 US 113 (1973). Were this Court to reverse the District Court's relief it would then confront constitutional questions which are manifestly substantial. It would, of course, be premature to consider the constitutional questions in the present posture of the case.

The District Court's injunction is even more clearly equitable in light of a change in Connecticut law that went into effect the day after the court issued its opinion. Connecticut has amended its statutory public assistance provisions to incorporate a good cause exception similar to the Social Security Act. Public Act 76-334 provides, in part that

> All information required to be provided to the commissioner as a condition of such eligibility under federal law shall be so provided by the supervising relative, provided, no person shall be determined to be ineligible if the supervising relative has good cause for the refusal to provide information concerning the absent parent or if the provision of such information would be against the best interests of the dependent child or children, or any of them. The commissioner of social services shall adopt by regulation, in accordance with subsection (b) of section 4-168, standards as to good cause and best interests of the child. Any person aggrieved by a decision of the commissioner as to the determination of good cause or the best interests of such child or children may request a fair hearing in accordance with the provisions of sections 17-2a and 17-2b.

The commissioner has promulgated no regulations in the more than six months P.A. 334 has been in effect. He therefore has no procedures or standards for enforcement of the cooperation requirement or Section 52-440b to propose to the District Court of this Court. The District Court concluded that

> "the wiser course is to require the Commissioner, if he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child, to postpone any enforcement until the new regulations have been issued and approved." 414 F Supp at 1381,n.20.

Connecticut apparently agrees that standardless enforcement is inappropriate, and has required the Commissioner to promulgate regulations defining the good cause exception. The Commissioner has not done so. In these circumstances it is surely equitable for the Commissioner to be restrained from standardless enforcement in violation of the intent of federal and state law. Moreover, if promulgation of regulations by the Commissioner or other circumstances should render the District Court's injunction inequitable, the opinion of the District

Court permits the Commissioner to apply there for a modification of the injunction. Instead the Commissioner has already done so with respect to mothers unable to provide the information he requires.[4] In these circumstances, where the Commissioner has declined either to comply with state law by promulgating regulations or to present those regulations or other standards to the District Court in a request for modification of the Court's injunction, the injunction is clearly equitable and it would be premature for this Court to intervene.

The District Court was acting well within its power in ordering that the Connecticut "cooperation" program not result in termination of benefits or incarceration, at least until the administrative and legislative tanges concerning the child's best interests are resolved.

III. THE FEDERAL "COOPERATION" REQUIREMENT HAS NOT YET GONE INTO EFFECT

Although the injunction issued by the District Court in this case rests on general equitable principles, it is also supportable on the ground that the "cooperation" requirement of the Social Security Act will not go into effect until the "good cause" regulations underlying it are promulgated by the Secretary and approved by the Congress, as required by the Social Security Act Amendments.

Nonetheless, it is wrong. The mother of an illegitimate child could never be required to disclose the father's name as a condition of receiving AFDC benefits for her child or herself before the effective date of P.L.93-647,

4/ When and if heard and determined, an appeal dealing with this issue could be prosecuted System Federation v. Wright, 364 US 642 (1961), Pasadena City Board of Education v. Spangler, ___ US ___ 49 LEd2d 599 (1976). If there is a change of circumstances, such as HEW recognition of the peculiar categories the appellant utilizes, the Court would have power to modify its injunction subject to appropriate reveiw at that time. At present though, appellant argues on distinctions which have never been presented to the District Court.

Lascaris v. Shirley, 420 US 730 (1975)(and cases cited therein). Both Lascaris and this case were pending when P.L. 93-647 was enacted and signed, but the effective date of the statutory amendment was set by Congress as July 1, 1975. After this Court's decision in Lascaris, and prior to that date, however, Congress acted again, to postpone the effective date until August 1, 1975 in order to further consider the questions raised in this litigation and elsewhere, P.L. 94-46, Section 2. Finally in P.L. 94-88 (effective August 1, 1975) Congress acted again, setting out a statutory exemption to the cooperation requirement for those cases in which a parent had good cause to refuse to pursue a support obligation taking into account the child's best interests, P.L. 94-88, Section 208. At the same time, Congress mandated extraordinarily close legislative supervision over the process of fleshing out the exception by providing that HEW's regulations would be subject to legislative review.

P.L. 93-647 became, as to its self-implementing aspects, effective with the passage of P.L. 94-88, August 1, 1975. But the "cooperation" requirement is not self-implementing. Rather, by statute it requires new regulations, P.L. 94-88 Section 208. Those regulations have not been issued, though some proposed regulations have been published, 41 Fed. Reg. 34296. Thus Section 402(a)(26) has not yet become effective, and this Court's decision in Lascaris still stands as the law until it does. The District Court sought to follow Lascaris and, through its injunction in this case to fulfill Congress' intent that children's best interests provide the touchstone. It was clearly correct and should be affirmed.

The argument to the contrary is not persuasive. The appellant notes that HEW had created a very limited exception to the "cooperation" requirement by regulation designed to be effective the same day as P.L. 93-647: 45 C.F.R.303.5 (40 Fed Reg 27165). But that regulation was designed to implement 402(2)(26) as

it stood in P.L. 93-647; due to the passage of P.L. 94-46 and subsequently P.L. 94-88 that section never became effective. P.L. 94-88 accomplished two very significant changes; it created a strict legislative supervision over the regulation, and it mandated a broader excetption than HEW had proposed[5] See H. Rept. 94-368 pp. 7, 8, 12, and 121 Cong. Rec. S14923 (Sen. Long). As passed in both House (121 Cong. Rec. HB157) and Senate (121 Cong. Rec. S14924), P.L. 94-88 was to be effective August 1, 1975 and President Ford did not suggest otherwise when he signed it into law August 8, 1975.

Thus the District Court was correct when it read the legislative history of P.L. 94-88 as supporting "the wiser course.../17/ to postpone any enforcement until the new regulations have been issued and approved" 414 F Supp at 1381 n 20.

IV. THE QUESTION DOES NOT HAVE SUBSTANTIAL IMPACT WARRANTING PLENARY REVIEW

A number of additional factors make this case appropriate for summary dismissal or affirmance. They are grouped together in this section because all reflect on the sound policy of handling the mandatory docket of this Court as expeditiously as possible. The questions as proposed by the appellant lack the broad application or massive impact necessary to qualify them as substantial.

A. Proposed Regulations

As noted throughout the Jurisdictional Statement, HEW has proposed regulations in response to the Congressional mandate of P.L. 94-88, 41 Fed Reg 34294-34301. The comment period has long since expired on these proposals.

5/ The District Court for the District of Columbia has refused to enjoin Section 303.5, Coe v. Mathews Civil Action 76-0794 (November 26,1976) (app. pending) (Corcoran,J).

The likelihood that HEW will promulgate some regulation before the Court hears this case in full is high. If that occurs, the Court would probably remand the case to the District Court. Even if it did not do so, the appellant would no longer be aggrieved by the terms of the injunction, since he would have to follow federal law with or without it. Since the effective federal law will soon change, affirmance without extended discussion best facilitates resolution of this already protracted litigation. See Lascaris v. Shirley (supra).

B. Local Scope of Decision

Connecticut's statute C.G.S. Section 52-440b with its possibility of incarceration as a civil contempt in addition to denial of welfare eligibility for refusal to disclose and prosecute putative fathers, is highly unusual. The State has not indicated that the injunction has resulted or will result in any financial loss to it, or even that 52-440b has ever been of any financial benefit to it. Indeed, a reading of the Jurisdictional Statement indicates scant interest in 52-440b. This case ought therefore finally be affirmed leaving future issues to future parties and litigation.

Furthermore Connecticut's attempt to define mothers unable to comply because they don't know the fathers' names as being neither cooperative nor uncooperative but somehow appropriately subject to immediate action under the statute flies in the face of all logic, as well as the proposed regulations. Obviously mothers are cooperating as far as they can. If for some reason the state believes, in a given case, that the mother is lying, she and her children deserve at least the same protections as those mothers who are unwilling to cooperate.

CONCLUSION

The direct appeal statute does not apply to this case and the appeal should therefore be dismissed. In the event the merits are reached, the Court should summarily affirm the Judgment of the District Court because the injunction was well within the Court's powers, the District Court correctly noted that the federal "cooperation" requirement was not yet effective and the appeal does not raise questions which will be of substantial import if the case is fully heard.

RESPECTFULLY SUBMITTED

By _____

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December 23, 1976

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December , 1976, copies of the foregoing Motion to Dismiss or Affirm were mailed postage prepaid to:

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_____
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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of December, 1976 copies of the foregoing were mailed, postage prepaid to counsel of record below and in this Court:

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Frank Cochran

Affidavit In Support of Motion of the
Class of Plaintiff-Appellee Mothers
to Proceed Herein In Forma Pauperis

State of Connecticut
ss At Hartford
County of Hartford

I, FRANK COCHRAN, Esquire, being first duly sworn, depose and say:

1. I am, and have been, the attorney of record for plaintiffs-appellees Sharon Roe, Doeothy Poe, Hattie Hoe, and Jane Robustelli, (plaintiff mothers) and for the class and subclasses of plaintiff mothers as they have been defined and certified during the course of this litigation.

2. All of my individual clients, and to the best of my knowledge all individuals actually threatened with enforcement of Connecticut General Statutes Section 52-440b are and have at all relevant times been recipients of assistance from the Connecticut Department of Social Services (formerly the Welfare Department) under the Aid to Families with Dependent Children (AFDC) program.

3. Plaintiff-mothers have always proceeded in forma pauperis in these actions. Specifically, plaintiff-mothers in Donna Doe et al v Nicholas Norton, D. Conn. Civil Action No. 15,579 at all times proceeded in forma pauperis, plaintiff-mothers in Sharon Roe et al v Nicholas Norton, D. Conn. Civil Action No. 15,589 proceeded in forma pauperis both at the trial level and before this Court on appeal 415 U.S. 912, and intervenors Hattie Hoe and Jane Robustelli were permitted to intervene in forma pauperis on remand.

4. The District Court has consistently, and without present opposition, permitted this action to proceed as a class action changing the definition of the classes and subclasses under Rule 23 of the Federal Rules of Civil Procedure.

5. To the best of my knowledge and belief, all of the class members threatened with or summoned under the statute in issue have been recipients of state welfare and unable, due to the poverty, to pay the costs of this litigation.

6. I have never received a fee for service in this action from any plaintiff-mother member of the class during the course of this litigation.

7. Although I have been unable to locate all of the individuals represented below, affidavits from those members of the class who are available are also attached to this motion.

Frank Cochran

Sworn to and subscribed before me this the 23rd day of December, 1976.

Commissioner of Superior Court

Affidavit In Support of Motion For
Leave to Proceed in Forma Pauperis
On Appeal

State of Connecticut : ss at Niantic, December , 1976
County of New London

I, Hattie Hoe, a fictitious name I have taken solely to protect my privacy in the course of the litigation known as Maher v Doe et al, and being first duly sworn, depose and say:

1. I am a plaintiff-appellee in this case, having been admitted as an intervening member of the class of plaintiff-mothers on remand of this action.

2. I am confined at the Connecticut Correctional Institution at Niantic and am unable to support myself.

3. I have insufficient funds to pay the costs of appeal or to provide security for such costs.

4. I own no real estate or other substantial property whatsoever.

5. The District Court permitted me to proceed in forma pauperis. My circumstances have not changed since that decision.

Hattie Hoe

Sworn and subscribed before me this the 20th day of December, 1976

Notary Public

My Commission expires 4/10/79.